

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

HAROLD LEE KENNEDY,	)	
	)	No. CV-08-3002-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 2, 2008. (Ct. Rec. 17, 21). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Stephanie R. Martz represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 21) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17.)

**JURISDICTION**

1 Plaintiff filed an application for SSI signed May 24, 2004,  
2 alleging onset as of May 1, 2003. (Tr. 62-63.) The application  
3 was denied initially and on reconsideration. (Tr. 41-42, 45-48.)  
4 Administrative Law Judge (ALJ) Ralph W. Jones held a hearing on  
5 March 8, 2007. (Tr. 272-300.) Plaintiff, represented by counsel,  
6 and vocational expert Gary Jesky testified. On April 20, 2007,  
7 the ALJ issued a decision finding that plaintiff was not disabled.  
8 (Tr. 14-20.) The Appeals Council denied a request for review on  
9 December 20, 2007. (Tr. 5-7.) Therefore, the ALJ's decision  
10 became the final decision of the Commissioner, which is appealable  
11 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff  
12 filed this action for judicial review pursuant to 42 U.S.C. §  
13 405(g) on January 14, 2008. (Ct. Rec. 1, 4.)

#### 14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing  
16 transcript, the ALJ's decision, the briefs of both Plaintiff and  
17 the Commissioner, and will only be summarized here.

18 Plaintiff was 41 years old at onset and 44 on the date of the  
19 hearing. (Tr. 275.) He completed eleventh grade and earned a  
20 GED. (Tr. 74, 275.) Plaintiff has past relevant work as a  
21 dishwasher and food assembler. (Tr. 69, 291.) He alleges  
22 disability as of May 1, 2003, due to vision and hearing problems,  
23 arthritis of the knees and ankles, back, kidney, gallbladder and  
24 urology problems, dizzy spells, loss of short and midterm memory,  
25 and high blood pressure. (Tr. 68, 75, 274.)

#### 26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the "Act") defines "disability"  
28

1 as the "inability to engage in any substantial gainful activity by  
2 reason of any medically determinable physical or mental impairment  
3 which can be expected to result in death or which has lasted or  
4 can be expected to last for a continuous period of not less than  
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
6 Act also provides that a Plaintiff shall be determined to be under  
7 a disability only if any impairments are of such severity that a  
8 plaintiff is not only unable to do previous work but cannot,  
9 considering plaintiff's age, education and work experiences,  
10 engage in any other substantial gainful work which exists in the  
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
12 Thus, the definition of disability consists of both medical and  
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
14 (9<sup>th</sup> Cir. 2001).

15 The Commissioner has established a five-step sequential  
16 evaluation process for determining whether a person is disabled.  
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
18 is engaged in substantial gainful activities. If so, benefits are  
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
20 not, the decision maker proceeds to step two, which determines  
21 whether plaintiff has a medically severe impairment or combination  
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination  
25 of impairments, the disability claim is denied. If the impairment  
26 is severe, the evaluation proceeds to the third step, which  
27 compares plaintiff's impairment with a number of listed  
28

1 impairments acknowledged by the Commissioner to be so severe as to  
2 preclude substantial gainful activity. 20 C.F.R. §§  
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
4 App. 1. If the impairment meets or equals one of the listed  
5 impairments, plaintiff is conclusively presumed to be disabled.  
6 If the impairment is not one conclusively presumed to be  
7 disabling, the evaluation proceeds to the fourth step, which  
8 determines whether the impairment prevents plaintiff from  
9 performing work which was performed in the past. If a plaintiff  
10 is able to perform previous work, that Plaintiff is deemed not  
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
12 At this step, plaintiff's residual functional capacity ("RFC")  
13 assessment is considered. If plaintiff cannot perform this work,  
14 the fifth and final step in the process determines whether  
15 plaintiff is able to perform other work in the national economy in  
16 view of plaintiff's residual functional capacity, age, education  
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish  
20 a *prima facie* case of entitlement to disability benefits.  
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
22 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
23 met once plaintiff establishes that a physical or mental  
24 impairment prevents the performance of previous work. The burden  
25 then shifts, at step five, to the Commissioner to show that (1)  
26 plaintiff can perform other substantial gainful activity and (2) a  
27 "significant number of jobs exist in the national economy" which  
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1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
2 Cir. 1984).

### 3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a  
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
6 the Commissioner's decision, made through an ALJ, when the  
7 determination is not based on legal error and is supported by  
8 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
9 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
10 1999). "The [Commissioner's] determination that a plaintiff is  
11 not disabled will be upheld if the findings of fact are supported  
12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
13 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
15 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
18 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
19 evidence as a reasonable mind might accept as adequate to support  
20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
21 (citations omitted). "[S]uch inferences and conclusions as the  
22 [Commissioner] may reasonably draw from the evidence" will also be  
23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
24 On review, the Court considers the record as a whole, not just the  
25 evidence supporting the decision of the Commissioner. *Weetman v.*  
26 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
27 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

1 It is the role of the trier of fact, not this Court, to  
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
3 evidence supports more than one rational interpretation, the Court  
4 may not substitute its judgment for that of the Commissioner.  
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
6 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
7 substantial evidence will still be set aside if the proper legal  
8 standards were not applied in weighing the evidence and making the  
9 decision. *Browner v. Secretary of Health and Human Services*, 839  
10 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
11 evidence to support the administrative findings, or if there is  
12 conflicting evidence that will support a finding of either  
13 disability or nondisability, the finding of the Commissioner is  
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
15 1987).

#### 16 ALJ'S FINDINGS

17 The ALJ found at step one that plaintiff has not engaged in  
18 substantial gainful activity since onset. (Tr. 15.) At steps two  
19 and three, the ALJ found that plaintiff suffers from a back  
20 disorder, hearing loss, and a personality disorder, impairments  
21 that are severe but which do not alone or combination meet or  
22 medically equal a Listing impairment. (Tr. 15-16.) At step four,  
23 relying on the VE's testimony, the ALJ found plaintiff is unable  
24 to perform his past relevant work. (Tr. 18.) At step five, again  
25 relying on the VE, the ALJ found there are other jobs plaintiff  
26 can perform. Accordingly, the ALJ found that plaintiff was not  
27 disabled within the meaning of the Social Security Act. (Tr. 18-  
28

1 20.)

2 **ISSUES**

3 Plaintiff contends that the Commissioner erred as a matter of  
4 law. Specifically, he argues that the ALJ erred by: (1)  
5 improperly rejecting the opinions of his treating physicians; (2)  
6 conducting an inadequate RFC assessment; and (3) failing to  
7 include all of plaintiff's limitations in the hypothetical  
8 presented to the VE. (Ct. Rec. 18 at 13-20).

9 The Commissioner opposes the plaintiff's motion for summary  
10 judgment and asks that the ALJ's decision be affirmed. (Ct. Rec.  
11 22 at 2-3).

12 **DISCUSSION**

13 **A. Weighing medical evidence**

14 In social security proceedings, the claimant must prove the  
15 existence of a physical or mental impairment by providing medical  
16 evidence consisting of signs, symptoms, and laboratory findings;  
17 the claimant's own statement of symptoms alone will not suffice.  
18 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
19 on the basis of a medically determinable impairment which can be  
20 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
21 medical evidence of an underlying impairment has been shown,  
22 medical findings are not required to support the alleged severity  
23 of symptoms. *Bunnell v. Sullivan*, 947, F. 2d 341, 345 (9<sup>th</sup> Cr.  
24 1991).

25 A treating physician's opinion is given special weight  
26 because of familiarity with the claimant and the claimant's  
27 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
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1 Cir. 1989). However, the treating physician's opinion is not  
2 "necessarily conclusive as to either a physical condition or the  
3 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
4 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
5 a treating physician than an examining physician. *Lester v.*  
6 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
7 weight is given to the opinions of treating and examining  
8 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
9 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
10 physician's opinions are not contradicted, they can be rejected  
11 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
12 If contradicted, the ALJ may reject an opinion if he states  
13 specific, legitimate reasons that are supported by substantial  
14 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
15 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

16 In addition to the testimony of a nonexamining medical  
17 advisor, the ALJ must have other evidence to support a decision to  
18 reject the opinion of a treating physician, such as laboratory  
19 test results, contrary reports from examining physicians, and  
20 testimony from the claimant that was inconsistent with the  
21 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
22 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
23 Cir. 1995).

24 Plaintiff contends that the ALJ improperly rejected some of  
25 the opinions of his treating physicians, specifically Dr.  
26 Bothamley's opinion that plaintiff needs to lie down during the  
27 day, and, given the ALJ's assessed RFC for light work, the  
28



1 opinions of Drs. Bothamley and Newkirk that plaintiff is limited  
2 to sedentary work. (Ct. Rec. 18 at 15-17.) The Commissioner  
3 responds that the ALJ properly weighed the medical evidence. (Ct.  
4 Rec. 22 at 2-3, 10-13.)

5 On October 1, 2004, Wallace Newkirk, M.D., opined that  
6 plaintiff's overall work level is sedentary. (Tr. 170.) The ALJ  
7 describes Dr. Newkirk as a treating physician (Tr. 18, referring  
8 to Tr. 170), but the record indicates October 1, 2004, is his  
9 first visit with plaintiff. (Tr. 171.) The ALJ notes Dr.  
10 Newkirk's opinion is the same as Dr. Bothamley's (in October of  
11 2005) that plaintiff "could perform sedentary work with  
12 restrictions." (Tr. 18.)

13 The ALJ characterizes Dr. Bothamley as plaintiff's primary  
14 treating physician:

15 In contrast [to the opinion of the consulting  
16 agency physician], the claimant's primary treating  
17 physician, Dr. Bothamley, provided a very supportive  
18 statement regarding the claimant's alleged  
19 disability (Ex. 17). In the March 5, 2007, statement,  
20 Dr. Bothamley wrote that claimant needs to lie down  
21 during the day, that he would miss 4 or more days per  
22 month, and that these limitations among others have  
23 existed for 20 years. Upon closer examination of Dr.  
24 Bothamley's actual treatment records, there is no  
25 reference to this daily limitation as well as an  
26 absence of any objective medical basis for the  
27 suggested restrictions and projected absences (Ex.  
28 16F). In fact, the first office visit on June 23,  
2005, is long after the claimant's alleged 2003 onset  
and well after the claimant's April 26, 2004, Title  
XVI application. Dr. Bothamley stated his belief  
claimant could perform sedentary work with  
restrictions in his October 2005 physical capacity  
determination (Ex. 13F). Similarly, the claimant's  
ability to work, and to work in a sedentary capacity,  
was supported by treating physician Newkirk in his  
October 2004 capacity report (Ex. 9F). These are not  
the only treating opinions offered.

(Tr. 17-186).

1 The ALJ observes both consulting agency physician Morris  
2 Fuller, M.D. (on December 3, 2004), and treating physician Judy  
3 Richardson, M.D. (on June 8, 2004), opined plaintiff is capable of  
4 light work. (Tr. 18, referring to Exhibits 2F and 10F at Tr. 121,  
5 175-178.)

6 To aid in weighing the conflicting medical evidence, the ALJ  
7 evaluated plaintiff's credibility. (Tr. 17-18.) Credibility  
8 determinations bear on evaluations of medical evidence when an ALJ  
9 is presented with conflicting medical opinions or inconsistency  
10 between a claimant's subjective complaints and diagnosed  
11 condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir.  
12 2005).

13 It is the province of the ALJ to make credibility  
14 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
15 1995). However, the ALJ's findings must be supported by specific  
16 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
17 Cir. 1990). Once the claimant produces medical evidence of an  
18 underlying medical impairment, the ALJ may not discredit testimony  
19 as to the severity of an impairment because it is unsupported by  
20 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
21 1998). Absent affirmative evidence of malingering, the ALJ's  
22 reasons for rejecting the claimant's testimony must be "clear and  
23 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
24 "General findings are insufficient: rather the ALJ must identify  
25 what testimony not credible and what evidence undermines the  
26 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
27 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

28 The ALJ relied on several factors when assessing credibility,

1 including the lack of objective evidence supporting plaintiff's  
2 subjective complaints. (Tr. 17-18.) The ALJ points out that  
3 plaintiff's testimony that he is in constant pain, fatigued due to  
4 insomnia for the last 16 years, unable to concentrate or remember  
5 information, and extremely limited physically in that he cannot  
6 walk, stand or sit longer than 15 minutes, is undercut by taking  
7 only non-prescribed ibuprofen for his conditions (with the  
8 exception of prescribed medication for high blood pressure). (Tr.  
9 17.) While not relied on by the ALJ, examining physician Emily  
10 Moser, M.D., indicated on August 8, 2005, that plaintiff's chronic  
11 back pain "is treated with ibuprofen quite effectively." (Tr.  
12 183.)

13 The ALJ observes that while plaintiff alleges constant,  
14 disabling pain, objective tests do not support the degree of  
15 impairment alleged: (1) 2006 hip x-rays reveal "mild" bilateral  
16 degenerative changes without evidence of any other bony  
17 abnormality, no erosive or destructive changes, no soft tissue  
18 calcification and no prior fractures (Tr. 18, referring to Ex.  
19 8F); and (2) 2004 left shoulder x-rays reveal moderate  
20 osteoarthritis, early bilateral knee osteoarthritis, and mild  
21 lumbar and thoracic disc degeneration. (Tr. 18, referring to  
22 Exhibits 8F, 14F, and 15F.)

23 The ALJ rejected Dr. Bothamley's assessed limitation of the  
24 need to lie down daily and to miss 4 or more days of work each  
25 month because Dr. Bothamley opined that these limitations, and  
26 others, have existed for 20 years [plaintiff has past relevant  
27 work during this time]; Dr. Bothamley's treatment records do not  
28 refer to a daily need to lie down; his treatment records contain

1 no objective medical basis for the restriction to lie down or the  
2 projected absenteeism, and he does not assess a limitation meeting  
3 the twelve month durational requirement. (Tr. 18.)

4 When he weighed the medical opinions, the ALJ considered  
5 plaintiff's credibility, the objective medical evidence, the lack  
6 of prescription pain medication despite complaints of disabling  
7 pain, the inconsistencies in Dr. Bothamley's assessments, and the  
8 opinions of other treating and reviewing physicians that plaintiff  
9 is capable of a range of light work.

10 The ALJ is responsible for reviewing the evidence and  
11 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
12 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
13 trier of fact, not this court, to resolve conflicts in evidence.  
14 *Richardson*, 402 U.S. at 400. The court has a limited role in  
15 determining whether the ALJ's decision is supported by substantial  
16 evidence and may not substitute its own judgment for that of the  
17 ALJ, even if it might justifiably have reached a different result  
18 upon de novo review. 42 U.S.C. § 405 (g).

19 Even if the evidence of probable malingering (Tr. 137-139) is  
20 excluded, the ALJ provided clear and convincing reasons for  
21 finding plaintiff's allegations not fully credible: complaints of  
22 disabling pain are undercut by taking non-prescribed medication  
23 (and are undercut further by plaintiff's statements to medical  
24 providers that ibuprofen is "quite effective," and objective  
25 findings do not substantiate plaintiff's multiple subjective  
26 complaints. The ALJ gave specific and legitimate reasons for  
27 discounting some of Dr. Bothamley's contradicted assessed  
28 limitations. These include relying on the opinions of other

1 treating, examining and consulting physicians, as well as  
2 plaintiff's assessed credibility, to the extent Dr. Bothamley  
3 relied on plaintiff's discredited self-report.

4 The ALJ's assessment of the medical opinion evidence is  
5 supported by the record and free of legal error.

6 **B. RFC assessment**

7 Plaintiff alleges the ALJ erred by failing to include several  
8 psychological limitations assessed by reviewing agency  
9 psychologists Mary Gentile, Ph.D., and Ed Beatty, Ph.D., in the  
10 RFC. (Ct. Rec. 18 at 17-19.)

11 Plaintiff has no record of treatment for psychological  
12 impairments; accordingly, there are no treating source opinions.  
13 After noting the lack of treatment records, the ALJ addresses the  
14 opinions of the agency consultants and of an examining  
15 psychologist:

16 The consulting opinions universally find claimant  
17 has a personality disorder but this disorder is not  
18 disabling. Specifically, psychologist Dr. Gentile  
19 concluded claimant has mild to no functional  
20 limitations despite his personality disorder with  
21 anti-social traits, specifically pedophilia by self  
22 report, and his polysubstance abuse, in reported  
23 remission (Ex. 7F). Based on Dr. Gentile's opinion,  
24 as well as the opinions of reviewing psychologist Dr.  
25 Beatty and examining psychologist Dr. [Lawrence] Lyon,  
26 the claimant is not presumed disabled under the  
27 applicable Listing (Ex. 1F; 5F; 11F).

28 . . . Under the "B" criteria . . . the undersigned  
finds the severity of the claimant's functional  
limitations are: no restrictions of activities of  
daily living; moderate difficulties in maintaining  
social functioning only in terms of avoiding contact  
with children; mild difficulties in maintaining  
concentration, persistence and pace secondary to  
his physical impairments; and no prolonged episodes  
of decompensation.

(Tr. 15-16.)

1 The RFC includes a quiet work setting to address plaintiff's  
2 hearing problems, no work involving contact with children to  
3 address pedophilia, and work limited to simple, routine, and  
4 repetitive tasks to accommodate assessed limitations with respect  
5 to detailed instructions, and, as noted, mild difficulties in  
6 maintaining concentration, persistence and pace secondary to  
7 assessed physical impairments. (Tr. 16.)

8 The assessed RFC is supported by the records cited by the  
9 ALJ, as well as other evidence. On August 6, 2004, examining  
10 psychologist Dr. Lyon assessed a current GAF of 62<sup>1</sup>. Test results  
11 suggested exaggeration, malingering, and lack of motivation. (Tr.  
12 137-138.) On August 23, 2004, consulting agency psychologist Dr.  
13 Gentile opined plaintiff's IQ may limit him to more simple tasks.  
14 (Tr. 144.) She assessed moderate limitations in the ability to  
15 understand, remember and carry out detailed instructions, to  
16 interact appropriately with the general public, and to maintain  
17 social functioning (caused by staying away from children). (Tr.  
18 142-145.) Similarly, on December 3, 2004, agency consultant Dr.  
19 Beatty assessed the same limitations and added a moderate  
20 limitation in the ability to maintain attention and concentration  
21 for extended periods. (Tr. 180-182.) The ALJ assessed this as a  
22 mild limitation (Tr. 16). The ALJ does not give specific reasons  
23 for rejecting Dr. Beatty's assessed greater degree of limitation,

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24  
25 <sup>1</sup>A GAF (Global Assessment of Functioning) of 62 indicates  
26 some mild symptoms (e.g., depressed mood and mild insomnia) or  
27 some difficulty in social, occupational, or school functioning  
28 (e.g., occasional truancy, or theft within the household), but  
generally functioning pretty well, has some meaningful  
interpersonal relationships. DIAGNOSTIC AND STATISTICAL  
MANUAL OF MENTAL DISORDERS FOURTH EDITION (DSM-IV), at p. 32.

1 moderate rather than mild impairment in the ability to concentrate  
2 for extended periods. Inferences from the evidence clearly  
3 support the ALJ's RFC. Test results strongly indicate  
4 malingering. Plaintiff has no record of any psychological  
5 treatment. In the opinion of examining psychologist Dr. Lyon,  
6 entitled to greater weight than a consultant's, plaintiff suffers  
7 mild symptoms. The ALJ's assessed limitations are supported by  
8 the record and free of legal error.

9 **C. Impairments included in hypothetical**

10 As noted, plaintiff alleges that the ALJ omitted limitations  
11 established by the evidence, including the need to lie down daily,  
12 absenteeism of four or more days of work monthly, and the  
13 psychological limitations assessed by the agency consultants  
14 discussed above. Contrary to plaintiff's argument, the ALJ  
15 included all of the limitations established by the evidence in his  
16 hypothetical.

17 The objective medical and other evidence supports the ALJ's  
18 finding that plaintiff has the RFC to perform a range of light  
19 work.

20 **CONCLUSION**

21 Having reviewed the record and the ALJ's conclusions, this  
22 court finds that the ALJ's decision is free of legal error and  
23 supported by substantial evidence.

24 **IT IS ORDERED:**

25 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is  
26 **GRANTED.**

27 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
28 **DENIED.**

1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel for Plaintiff and Defendant, enter  
3 judgment in favor of Defendant, and **CLOSE** this file.

4 DATED this 15th day of September, 2008.

5 s/ James P. Hutton

6 JAMES P. HUTTON  
7 UNITED STATES MAGISTRATE JUDGE  
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